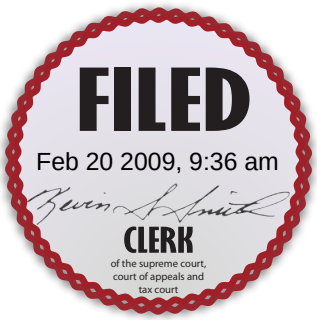


ATTORNEYS FOR APPELLANT:

**SUSAN K. CARPENTER**
Public Defender of Indiana

**VICTORIA CHRIST**
Deputy Public Defender

ATTORNEYS FOR APPELLEE:

**GREGORY F. ZOELLER**
Attorney General of Indiana

**ZACHARY J. STOCK**
Deputy Attorney General

# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| RICKIE JOHNSON, | ) | |
| | ) | |
| Appellant-Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 49A04-0808-PC-489 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Respondent. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia J. Gifford, Judge
Cause No. 49G04-0301-PC-6401

**February 20, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-petitioner Rickie Johnson appeals the denial of his petition for post-conviction relief following his convictions and the eighty-one-year aggregate sentence that was imposed for Criminal Deviate Conduct,[1] a class A felony, Carjacking,[2] a class B felony, Robbery,[3] a class C felony, and Confinement,[4] a class D felony, claiming ineffective assistance of both trial and appellate counsel. Specifically, Johnson claims that his attorneys were ineffective because they failed to challenge the convictions and sentences for both carjacking and robbery in light of double jeopardy concerns and the single larceny rule. Johnson also maintains that his trial counsel was ineffective for failing to object to the imposition of consecutive sentences in excess of thirty years for robbery, carjacking, and confinement, because of the consecutive sentencing limitations set forth in Indiana Code section 35-50-1-2. Johnson also contends that his appellate counsel was ineffective for failing to raise that issue on direct appeal.

We conclude that Johnson has failed to establish the ineffectiveness of trial or appellate counsel for not challenging the propriety of the convictions and sentences for both carjacking and robbery under the single larceny rule. However, we find that Johnson's trial counsel should have objected to the aggregate thirty-one-year sentence that was imposed on the carjacking, robbery and confinement convictions because of the consecutive sentence

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[1] Ind. Code § 35-42-4-2.

[2] I.C. § 35-42-5-2.

[3] I.C. § 35-42-5-1.

[4] I.C. § 35-42-3-3.

limitations set forth in Indiana Code section 35-50-1-2, and that his appellate counsel should have raised that issue on direct appeal. Finding that Johnson should have received only a thirty-year sentence on those offenses, we reverse the post-conviction court's judgment on this issue and remand this cause with instructions that the trial court modify Johnson's aggregate sentence from eighty-one years to eighty years.

## FACTS

The facts, as set forth in Johnson's direct appeal, are as follows:

> In January 2003, A.M. was exiting her truck when Euranus Johnson (Euranus) put a gun to her side and told her to get back into the truck. Euranus got into the driver's seat, and Rickie [Johnson] got into the passenger seat with A.M. between them. A third man, Richard White (Richard), got into the bed of the truck. They drove to two bank machines in an attempt to obtain money using A.M.'s bankcard. Euranus sexually assaulted A.M. and forced her to engage in intercourse with him in the truck while the other two men went to the bank machine. When Rickie and Richard returned from the bank machine the group continued to a garage. While in the garage, Rickie forced A.M. to perform oral sex on him while Richard engaged in intercourse with A.M. Euranus then forced A.M. to perform oral sex and engage in intercourse with him in several different positions. When the group left the garage, Rickie and Richard told Euranus to release A.M., but Euranus refused. Eventually, they pulled the truck into an alley and allowed A.M. to exit the bed of the truck. A.M. walked to a nearby house where the residents called 911. Based upon his participation in these events, Rickie was convicted by a jury of criminal deviate conduct, confinement, carjacking, and robbery. He was sentenced to an aggregate term of eighty-one years.

Johnson v. State, No. 49A04-0412-CR-672, slip op. at 2-3 (Ind. Ct. App. Nov. 1, 2005).

In addition to the above, we note that the carjacking, robbery, and confinement counts were all charged as class B felonies. Although the State agreed that the confinement

conviction should be entered as a class D felony, presumably because the same deadly weapon was already used to enhance another conviction, it recommended that the trial court impose the maximum sentence of twenty years on both the carjacking and robbery charges. The State also argued that the trial court should impose maximum consecutive sentences on each count for an aggregate sentence of ninety-three years.

Although the trial court imposed the maximum consecutive sentences, it entered a conviction on Johnson's robbery conviction as a class C felony, which resulted in an eight-year term of imprisonment. Thus, because the conviction for confinement was entered as a class D felony, Johnson was sentenced to an aggregate term of eighty-one years.

Thereafter, Johnson directly appealed to this court, arguing that the evidence was insufficient to support the conviction for criminal deviate conduct, portions of Euranus's testimony were improperly admitted into evidence, the sentence was inappropriate, and that the trial court abused its discretion in imposing consecutive sentences. This court affirmed Johnson's convictions and sentences in all respects, and we determined that the aggregate sentence was appropriate in light of the nature of the offenses and Johnson's character. We also found that Johnson's criminal history supported the trial court's imposition of consecutive sentences. Johnson, slip op. at 12.[5]

On May 15, 2007, Johnson filed an amended petition for post-conviction relief,[6]

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[5] Our Supreme Court denied transfer in this case on January 4, 2006.

[6] Johnson originally filed a pro se petition for post-conviction relief on February 23, 2006.

alleging that his trial counsel was ineffective for failing to "object to the court's imposition of sentences on [the carjacking and robbery counts] which violated the prohibition against double jeopardy and to the consecutive sentences that violated I.C. § 35-50-1-2." Appellant's App. p. 68. Johnson also maintained that that the "imposition of consecutive sentences for [carjacking, robbery, and confinement] totaling thirty-one years" was erroneous. Id. at 71. Finally, Johnson alleged that his appellate counsel's failure to raise these issues on direct appeal constituted ineffective assistance of counsel.

Following an evidentiary hearing on Johnson's petition on January 9, 2008, the post-conviction court denied Johnson's request for relief. In relevant part, the post-conviction court's findings of fact and conclusions of law provided as follows:

FINDINGS OF FACT

. . .

> 9. At the post-conviction hearing, Defendant offered an affidavit from [defense counsel] in which he stated:
>
> I did not object to the court's imposition of sentences for both robbery and carjacking on the grounds that sentencing for both crimes violated the prohibition against double jeopardy. My main concern was arguing against imposition of maximum sentences, and I felt the best course of action was to let the court know that Rickie Johnson was not the major actor in the crime and that his actions were not as egregious as the other two defendants.
>
> I did not object to the court's imposition of consecutive sentences on Counts 6-8 which totaled thirty-one (31) years. Again, my main concern was convincing the judge not to impose the maximum terms which I felt could be accomplished by arguing that Rickie Johnson was less culpable and that his actions were not as egregious as the other two defendants.
>
> . . .

CONCLUSIONS OF LAW

2(a). Because [carjacking and robbery] are not subject to the single larceny rule or double jeopardy, an objection would have served no purpose. Defendant has not proven that such an objection would have been sustained, nor prejudiced, nor ineffective assistance of counsel.

b. Defendant asserts that his trial counsel failed to object to the imposition of consecutive sentences for [carjacking, robbery, and confinement], which totaled 31 years. [Carjacking], the highest of the three consecutive sentences, was a class B felony. Pursuant to I.C. § 35-50-2-4, the advisory sentence of a class A felony is 30 years. Defendant alleges that he received ineffective assistance of trial counsel based on his counsel's failure to object to the discrepancy in sentences. . . . Trial counsel chose a strategy and followed it. His representation did not fall below an objective standard of reasonableness nor did he commit errors so serious as to render Defendant without "counsel" as guaranteed by the Sixth Amendment. . . . And the difference between the cap of 30 years as called for by I.C. 35-50-1-2(c) and the 31 year sentence received by Johnson as to the counts in question, which in practical effect with good time DOC credit constitutes 6 months, is not an error that per se constitutes ineffectiveness.

3. Ineffective Assistance of Appellate Counsel.

. . .

a. As in his argument for ineffective assistance of trial counsel, Defendant asserts that the single larceny rule prohibits sentences for separate counts when the items of property are taken at the same time and from the same place. However, as discussed supra, both the single larceny rule and the prohibition against double jeopardy are not applicable to the facts of this case because the carjacking and robbery were committed at different places and different times. Furthermore, the charges and elements of each count require different facts and, therefore, do not come under the prohibition against double jeopardy. Appellate counsel's choice not to raise this issue appears reasonable in light of the facts of the case and the precedent available to counsel when that choice was made.

b. Defendant next alleges that appellate counsel should have raised on appeal that the consecutive sentences were in violation of I.C. § 35-50-1-2. Defendant asserts that the consecutive sentences exceeded the statutory limit. However, [appellate counsel] did argue on appeal that Defendant's sentence was inappropriate, including challenging the

> consecutive sentences. The Appellate court disagreed, holding that the imposition of the consecutive sentences was within the broad discretion of the trial court. Defendant's arguments and evidence on this final allegation do not overcome the strongest presumption of adequate assistance by appellate counsel; therefore, his ineffective assistance of appellate counsel claim also fails.

Appellant's App. p. 129-39. Johnson now appeals.

## DISCUSSION AND DECISION

### I. Standard of Review

We initially observe that post-conviction proceedings are civil in nature. Stevens v. State, 770 N.E.2d 739, 745 (Ind. 2002). To prevail, a petitioner must establish his claim by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). We also note that post-conviction relief affords a narrow range of remedies for collateral challenges. Martin v. State, 760 N.E.2d 597, 599 (Ind. 2002). Because Johnson is appealing from a negative judgment, we will not disturb the post-conviction court's ruling unless he can demonstrate that the evidence as a whole leads unerringly and unmistakably to a decision contrary to that reached by the post-conviction court. Wesley v. State, 788 N.E.2d 1247, 1250 (Ind. 2003).

### II. Ineffective Assistance of Trial Counsel

#### A. Generally

Johnson maintains that his trial counsel was ineffective for failing to object to the sentences that were imposed for carjacking and robbery. Specifically, Johnson argues that the imposition of sentences on both offenses violated the single larceny rule because the evidence established that "the taking of the victim's car and property . . . occurred at the same

time and place." Appellant's Br. p. 8. Thus, Johnson argues that had counsel objected, the trial court would have corrected the single larceny rule violation and the eight-year sentence for robbery would have been vacated.

In a related argument, Johnson contends that even if the trial court was correct in imposing a sentence on the robbery count, his trial counsel was ineffective for failing to object to the length of the consecutive sentences that were imposed on the carjacking, robbery, and confinement convictions. More particularly, Johnson claims that because the offenses involved the same victim and "were close in time and place," imposition of consecutive terms for those three offenses totaling thirty-one years violated the consecutive sentencing limitations imposed by Indiana Code section 35-50-1-2. Id. In light of this provision, Johnson maintains that the aggregate consecutive sentences that were imposed on those offenses could not have exceeded thirty years.

As explained by our Supreme Court in Overstreet v. State, 877 N.E.2d 144, 152 (Ind. 2007), a defendant must establish before the post-conviction court the two components set forth in Strickland v. Washington, 466 U.S. 668 (1984), to establish a violation of the Sixth Amendment right to effective assistance of trial or appellate counsel. First, a defendant must show that counsel's performance was deficient, and this requires a showing that counsel's representation fell below an objective standard of reasonableness based upon prevailing professional norms. Overstreet, 877 N.E.2d at 152. Second, a defendant must show that the deficient performance prejudiced the defense, and this requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, meaning a trial whose result

is reliable. Id. Put another way, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. A reasonable probability is one that is sufficient to undermine confidence in the outcome. Id. The failure to satisfy either prong of the Strickland test will cause the claim to fail. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). Indeed, most ineffective assistance of counsel claims can be resolved by a prejudice inquiry alone. Id.

We also note that isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. Douglas v. State, 800 N.E.2d 599, 607 (Ind. Ct. App. 2003). Finally, when an appellant brings an ineffective assistance of counsel claim based upon a trial counsel's failure to make an objection, the appellant must demonstrate that the trial court would have sustained a proper objection. Glotzbach v. State, 783 N.E.2d 1221, 1224 (Ind. Ct. App. 2003). The defendant must prove that the failure to object was unreasonable and resulted in sufficient prejudice such that there is a reasonable probability that the outcome of the trial would have been different. Potter v. State, 684 N.E.2d 1127, 1132 (Ind. 1997).

B. Carjacking and Robbery—the Single Larceny Rule

As noted above, Johnson argues that his trial counsel was ineffective for failing to object to the trial court's imposition of a sentence for both robbery and carjacking because sentencing him on both offenses allegedly violated the single larceny rule. The single larceny rule prohibits sentences for separate counts when the items of property are taken at the same time and from the same place from the same or different individuals. Raines v. State, 514

N.E.2d 298, 300 (Ind. 1987). The basis for the rule is that "the taking of several articles at the same time from the same place is pursuant to a single intent and design." Id. As a result, if only one offense has been committed, there may be but one judgment and one sentence. Id.

This court has recently construed the single larceny rule. In Taylor v. State, 879 N.E.2d 1198 (Ind. Ct. App. 2008), the evidence established that Taylor stole a vehicle that contained a purse. Two small children were riding in the backseat. The children's father began to follow in another car, and although Taylor drove away with the children inside, he subsequently decided to abandon the vehicle and flee with the purse. Id. at 1201. Following a jury trial, Taylor was convicted of numerous offenses, including kidnapping, confinement, and two counts of theft for stealing the vehicle and the purse. Id. at 1202. On appeal, Taylor argued that the two counts of theft should have merged under the single larceny rule. Id. at 1204. A panel of this court rejected that argument and concluded that the purpose of the single larceny rule would not be served by merging the theft convictions because they were independently conceived in the defendant's mind and executed in the alternative. Id. Specifically, it was determined that,

> [h]aving concluded it was not worthwhile to keep a car with two children in it and their father close behind, Taylor made an independent decision to steal [the victim's purse] when he abandoned the car. . . . Taylor's thefts were not pursuant to a single design and do not warrant application of the single larceny rule.

Id.

Like the circumstances in Taylor, the evidence in this case demonstrated that Johnson

and the others confined the victim, stole her money, and attempted to obtain more money from the ATM. When they determined that they "didn't get [enough] money," the defendants sexually assaulted the victim. Appellant's App. p. 177. The defendants eventually released the victim and fled in her vehicle.

When examining these circumstances, it is apparent that the victim's vehicle and money were appropriated by Johnson and the others at the same time, but those offenses were committed with separate intentions and designs. In other words, as in Taylor, the defendants' crimes were separately conceived events that occurred only after other crimes had been committed or attempted. Therefore, we conclude that Johnson was properly convicted and sentenced for both robbery and carjacking and there was no violation of the single larceny rule. Thus, Johnson does not prevail on this claim of ineffective assistance of trial counsel.

B. Thirty-One-Year Sentence

Johnson also claims that the trial court erred in imposing consecutive sentences for carjacking, robbery, and confinement totaling thirty-one years because of the prohibitions set forth in Indiana Code section 35-50-1-2. When Johnson committed the offenses in 2003, Indiana Code section (c) of the statute provided that

> The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 and IC 35-50-2-10, to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the presumptive sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

I.C. § 35-50-1-2(c) (emphasis added).[7] The "crimes of violence" set forth in the statute are:

> (1) murder (IC 35-42-1-1);
>
> (2) attempted murder (IC 35-41-5-1);
>
> (3) voluntary manslaughter (IC 35-42-1-3);
>
> (4) involuntary manslaughter (IC 35-42-1-4);
>
> (5) reckless homicide (IC 35-42-1-5);
>
> (6) aggravated battery (IC 35-42-2-1.5);
>
> (7) kidnapping (IC 35-42-3-2);
>
> (8) rape (IC 35-42-4-1);
>
> (9) criminal deviate conduct (IC 35-42-4-2);
>
> (10) child molesting (IC 35-42-4-3);
>
> (11) sexual misconduct with a minor as a Class A felony under IC 35-42-4-9(a)(2) or a Class B felony under IC 35-42-4-9(b)(2);
>
> (12) robbery as a Class A felony or a Class B felony (IC 35-42-5-1);
>
> (13) burglary as a Class A felony or a Class B felony (IC 35-43-2-1); or
>
> (14) causing death when operating a motor vehicle (IC 9-30-5-5).

I.C. § 35-50-1-2(a).[8]

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[7] The current version of the statute substitutes the term "presumptive" sentence with "advisory" sentence.

[8] Amendments to this section of the statute include the offense of "operating a motor vehicle while intoxicated causing serious bodily injury to another person" as a crime of violence pursuant to Indiana Code section 9-30-5-4. The offense of resisting law enforcement as a felony pursuant to Indiana Code Indiana Code section is also included as a crime of violence. I.C. § 35-50-1-2(a)(15) and -(16).

Another section of the statute, Indiana Code section 35-50-1-2(b), defines a single episode of criminal conduct "offenses or a connected series of offenses that are closely related in time, place, and circumstance." Both this court and our Supreme Court have determined that a connected series of offenses occurs when a complete account of a crime cannot be given without referring to the other offense. Smith v. State, 770 N.E.2d 290, 294 (Ind. 2002); Tedlock v. State, 656 N.E.2d 273, 275 (Ind. Ct. App. 1995). Finally, in Reed v. State, our Supreme Court observed that in determining whether crimes constitute an episode of criminal conduct, the focus is on the timing of the offenses and the simultaneous and contemporaneous nature, if any, of the crimes. 856 N.E.2d 1189, 1200 (Ind. 2006). Even if the conduct is not precisely simultaneous or contemporaneous, offenses may be an "episode" if they are closely connected in time, place and circumstances. Id.

As noted above, the statute does not identify class C felony robbery, confinement, or carjacking as crimes of violence. Therefore, those crimes are not exempt from the consecutive sentencing cap limitations if it is determined that the offenses arose out of an episode of criminal conduct. In other words, the aggregate sentence imposed on those offenses could not exceed thirty years because that is the presumptive sentence for a class A felony, "which is one class of felony higher than the most serious of the felonies" of which Johnson was convicted. I.C. § 35-50-1-2(c).

The evidence in this case established that Johnson's convictions resulted from conduct that occurred contemporaneously over the course of an hour and were closely connected in time, place, and circumstance. More specifically, Johnson's involvement in the offenses

began at llth and Alabama Streets in Indianapolis. Tr. p. 58. After forcing the victim into the vehicle at gunpoint, Euranus drove them to a National City Bank where there was no ATM and he continued driving with the gun either in his lap or in his hand. Id. at 59. Johnson took the victim's purse and removed $40 in cash while calling the victim a "bitch" and saying that he would "bury her." Id. at 65. After Johnson and the others sexually assaulted A.M., they ordered her from the vehicle near 9th and Chester Streets and drove away.

Inasmuch as the evidence established that Johnson committed the charged offenses over a short and continuous period of time and involved the same victim, the offenses were committed during an episode of criminal conduct within the meaning of Indiana Code section 35-50-1-2. Therefore, the consecutive sentencing limitation set forth in Indiana Code section 35-50-1-2 applies, and Johnson cannot receive an aggregate sentence of more than thirty years on the carjacking, robbery, and confinement convictions.

Instructive on this point is our Supreme Court's opinion in Ellis v. State, 736 N.E.2d 731 (Ind. 2000). In that case, the evidence established that

> On the evening of August 5, 1998, Ellis was at his parents' home with a friend, Chris Richardson. Ellis and Richardson played foosball and ate pizza. In anticipation of Ellis' wife coming over, Ellis told Richardson (who had been smoking marijuana) to leave for a while so that Ellis' wife would not complain about his company.
>
> At 12:30 a.m., now August 6th, Angie Ellis arrived to pick up their son Alec. Ellis and Angie were married at the time, but separated. Angie was living at the home of her mother and stepfather. Ellis testified that when Angie arrived to pick up Alec she invited Ellis over to her parents' home to talk. Angie did not want to talk in front of Alec, who was still awake.
>
> Ellis arrived at the home of Angie's parents and saw Angie on the couch kissing Matt Bebout. Ellis left and later returned carrying a .22 caliber handgun.

> Ellis entered Angie's parents' home, dressed in all black, and approached Bebout and Angie, who were still seated on the couch. He shot Bebout in the right cheek, and the bullet lodged in Bebout's neck. Ellis next shot Angie six times, killing her. Ellis then kicked in the bedroom door of Angie's stepfather, Curt Krauss, and shot him in the cheek and hand.
>
> The jury found Ellis guilty of murder, two counts of attempted murder, and burglary. The trial court imposed consecutive sentences of sixty-five years for murder and fifty years for each attempted murder. It also ordered a concurrent twenty-year sentence for burglary. The sentence thus totaled 165 years.

Id. at 732-33. Ellis appealed, and in determining that the aggregate sentence should not have exceeded 120 years, our Supreme Court observed as follows:

> [T]he State argues that Ind. Code § 35-50-1-2(c) does not apply at all as long as any of the convictions for which Ellis received consecutive sentences was a crime of violence.
>
> . . .
>
> Construction of the statute is necessary because it involves some ambiguity as to whether the existence of one crime of violence is sufficient to exempt each of the consecutively sentenced convictions from the statutory limitation.
>
> "[T]he rule of lenity requires that criminal statutes be strictly construed against the State." Walker v. State, 668 N.E.2d 243, 246 (Ind. 1996) (citing Bond v. State, 515 N.E.2d 856, 857 (Ind.1987)). Adherence to this rule requires that we interpret the statute to exempt from the sentencing limitation (1) consecutive sentencing among crimes of violence, and (2) consecutive sentencing between a crime of violence and those that are not crimes of violence. However, the limitation should apply for consecutive sentences between and among those crimes that are not crimes of violence.
>
> Therefore, the trial court erred when it ordered Ellis' sentences for the two counts of attempted murder to be served consecutively for a total term of 100 years. This portion of the sentence exceeded the statutory limitation. The limitation should have been fifty-five years for consecutive sentencing, i.e., the presumptive sentence for the felony one class higher than attempted murder.
>
> The trial court did not err, however, by ordering the murder sentence served consecutively to the two counts of attempted murder without limitation. Therefore, Ellis may properly be sentenced for sixty-five years for murder, to be served consecutively with a fifty-five year sentence for the attempted murders, resulting in a total sentence of one hundred and twenty years.

Id. at 737-38.

In considering the holding in Johnson and the provisions of Indiana Code section 35-50-1-2, we can only conclude that had Johnson's trial counsel objected to the imposition of a thirty-one-year aggregate sentence on the offenses of carjacking, robbery, and confinement, the trial court would have been obligated to correct the sentence and impose a term that would not exceed thirty years. Therefore, Johnson's trial counsel was ineffective on this basis and we are compelled to remand this cause with instructions that the trial court revise Johnson's aggregate sentence on the robbery, carjacking, and confinement from thirty-one years to thirty years.

## III. Ineffective Assistance of Appellate Counsel

In addition to the standards set forth above regarding the ineffective assistance of trial counsel, we note that to prevail on a claim of ineffective assistance of appellate counsel, a petitioner must demonstrate by a preponderance of the evidence that appellate counsel's performance was deficient, and that the asserted deficiency effectively deprived him of an effective appeal. Stowers v. State, 657 N.E.2d 194, 200 (Ind. Ct. App. 1995). As a general proposition, Indiana recognizes three basic categories of alleged appellate counsel ineffectiveness: (1) denying access to an appeal, (2) failing to present an issue upon appeal, and (3) failing to present issues completely and effectively. Bieghler v. State, 690 N.E.2d 188, 193-95 (Ind. 1997).

Allegations of ineffective assistance of appellate counsel regarding the selection and presentation of issues must overcome the strongest presumption of adequate assistance. Law v. State, 797 N.E.2d 1157, 1162 (Ind. Ct. App. 2003). This is so because the decision as to what issue(s) to raise on appeal is one of the most important strategic decisions made by appellate counsel. Id. When such an error is alleged, no deficient performance will be found in appellate counsel's choices so long as the choice appears reasonable in light of the facts of the case and the precedent available to counsel at the time the decision was made. Id. Indeed, we will only find deficient performance where "the omitted issues were significant, obvious, and clearly stronger than those presented." Wrinkles v. State, 749 N.E.2d 1179, 1203 (Ind. 2001). In instances where we determine that a defendant did not receive ineffective assistance of trial counsel, the defendant "can neither show deficient performance nor resulting prejudice as a result of his appellate counsel's failure to raise [the] argument[s] on appeal." Davis v. State, 819 N.E.2d 863, 870 (Ind. Ct. App. 2004). In short, counsel's performance is not deficient if he or she failed to present a claim that would have been meritless. Stowers, 657 N.E.2d at 200.

As for Johnson's single larceny rule challenge, we conclude for the same reasons set forth above regarding the alleged ineffectiveness of trial counsel that Johnson has failed to demonstrate that his appellate counsel was ineffective for not presenting the argument on direct appeal. Thus, Johnson cannot demonstrate that the result of his appeal would have been different had his appellate counsel raised the issue. See Davis, 819 N.E.2d at 870.

Finally, Johnson claims that his appellate counsel was ineffective for failing to argue

on direct appeal that the trial court improperly imposed a sentence of thirty-one years in violation of the consecutive sentencing limits. In Haggard v. State, 810 N.E.2d 751, 757 (Ind. Ct. App. 2004), this court held that the sentencing limit claim under Indiana Code section 35-50-1-2 was both significant and obvious and should have been raised on direct appeal by appellate counsel. Because counsel failed to do so, it was determined that the defendant met his burden in establishing the ineffective assistance of appellate counsel. Thus, we remanded the case with instructions that the trial court enter a sentence "which conforms to the statutory restrictions." Id.

In this case, we must conclude—as we did regarding Johnson's claim of the ineffectiveness of his trial counsel—that the failure to argue for a corrected sentence that would have reduced the aggregate term of imprisonment amounted to ineffective assistance of appellate counsel. Id.; see also Glover v. United States, 531 U.S. 198, 203 (2001) (recognizing that there is no authority suggesting that a minimal amount of additional time in prison cannot constitute prejudice, and our jurisprudence suggests that any amount of jail time has Sixth Amendment significance).

## CONCLUSION

In light of our discussion above, we conclude that neither trial counsel nor appellate counsel was ineffective for not challenging the propriety of Johnson's convictions and sentences for carjacking and robbery under the single larceny rule. However, we find that Johnson's trial and appellate counsel were ineffective for failing to challenge the propriety of the thirty-one-year aggregate sentence that was imposed on the robbery, carjacking, and

confinement counts because those offenses were part of an "episode of criminal conduct" pursuant to Indiana Code section 35-50-1-2(c). In short, the consecutive sentencing cap set forth in that statute mandates that Johnson could not have been sentenced to an aggregate term greater than thirty years on those counts. Thus, we affirm in part, reverse in part, and remand with instructions that the trial court correct Johnson's aggregate sentence that was imposed on all convictions from eighty-one years to eighty years.

The judgment of the post-conviction court is affirmed in part, reversed in part, and remanded with instructions.

NAJAM, J., and KIRSCH, J., concur.